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SCC clarifies that provincial superior courts can decide the lawfulness of federal legislation if doing so is a “necessary step” in resolving the claim before them

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On July 9, 2015, the Supreme Court of Canada released its decision in [Strickland v Canada, 2015 SCC 37 \(Strickland\)](#). At the heart of the case was whether the Federal Court was correct in refusing to exercise its discretion to hear a judicial review of the *Federal Child Support Guidelines* (the *Guidelines*) on the basis that the provincial superior courts were a more appropriate venue. While the decision dealt specifically with the *Guidelines*, the conclusions reached therein apply equally to all federal legislation.

The applicants argued that section 18 of the *Federal Courts Act* provides the Federal Court exclusive jurisdiction to declare federal regulations *ultra vires* and therefore the only possible venue for a determination in respect of the lawfulness of the *Guidelines* was the Federal Court. The [Federal Court](#) disagreed, as did the [Federal Court of Appeal](#). The Supreme Court of Canada agreed with the lower courts and dismissed the appeal.

The central legal issues before the Court were: (1) whether the provincial superior courts had concurrent jurisdiction and (2) whether the Federal Court erred in refusing to exercise its discretion to hear the judicial review on its merits.

Concurrent Jurisdiction

The Court reviewed the history of the federal courts noting that although the Federal Court has exclusive jurisdiction with respect to judicial review, this is “a qualification of the general rule of concurrent jurisdiction between it and the provincial superior courts.” (para. 19) It then reviewed its past decisions in *TeleZone*, *McArthur*, and *Canadian Food Inspection Agency* and found that they support the proposition that “provincial superior courts, in the context of proceedings properly before them, can address the legality of the conduct of federal boards, commissions and tribunals, where doing so is a necessary step in resolving the claims asserted in those proceedings.” (para. 33)

Judicial Discretion

Turning to the issue of judicial discretion, the Court noted that “judicial review by way of the old prerogative writs has always been understood to be discretionary”. (para. 37) The appellants in this case sought a purely public law remedy – a declaration of unlawfulness. They further argued that as only the Federal Court could provide such a remedy, it had to exercise its jurisdiction. The Court disagreed that the appellants had a right to judicial review noting that such a right could not exist given the discretionary basis of judicial review. As to adequate alternate remedies, the Court found that the judicial review proceedings were “deeply inconsistent” with Parliament’s choice to assign family law issues to provincial courts. The Court further found that judicial review was not more efficient in this case as the resulting ruling would not be binding on any provincial superior courts and would therefore have to be re-litigated.

Furthermore, adjudication in the context of *Divorce Act* or child support proceedings would ensure full participation of all parties.

Conclusion

In sum, the Court held that although the Federal Court has exclusive jurisdiction over judicial review of federal laws, its power to do so is discretionary and need not be exercised where a provincial superior court is already required to determine the lawfulness of the federal legislation in resolving the claim before it. The decision is helpful as it provides further clarification as to the appropriate venue for resolving the lawfulness of federal legislation. One of the potential practical effects of the case is that it deters litigants from forum shopping between the Federal Court and the provincial superior courts on such issues.

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